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1. The Historical Evolution

Note on Trespass and Negligence

By the thirteenth century the early English courts were compensating plaintiffs for injury to person or property that the defendant had inflicted by a direct and immediate act, in which case an action in trespass was said to lie. Somewhat later the courts developed the action on the case, which permitted recovery even where the harm suffered by the plaintiff had been "consequential" rather than "direct": a standard illustration of the distinction was that if A threw a log into the highway and hit B the action would be in trespass, but if B tripped over it later the action would be in case. (See for example Leame v. Bray, [1803] 3 East. 593 at 602-3.)

These were two important differences between the two actions. First, trespass was actionable without proof of actual damage, whereas for case damage generally had to be shown. The second difference related to the standard of liability and onus of proof. A plaintiff suing in case had to show that the defendant had acted either negligently or with wrongful intent, but where the action was in trespass the early common law imposed a relatively strict standard of liability: once the plaintiff had shown that the injury was direct then the defendant would be held liable unless he could plead one of a number of permissible defences which had developed; the most important of these was the defence of inevitable accident, although there were a number of others, including self-defence and consent. In Weaver v. Ward (1616), Hob. 134 it was said that a defendant could only rely on a plea of inevitable accident if the injury had occurred "utterly without his fault, as if a man by force take my hand and strike you," but there is some dispute as to whether in practice this standard of responsibility amounted to strict liability in the modern sense or whether it constituted a somewhat less exacting standard: see, for example, the differing views of Lord Esher M.R. and Fry L.J. in The Schwan, [1982] P. 419 at 429 and 432f respectively, as well as the discussion by Diplock J. in Fowler v. Lanning, [1959] 1 Q.B. 426 at 432 ff.

It nonetheless seems clear that liability for direct injury was stricter than for consequential harm, and that the onus of proof also varied with the nature of the injury. By the mid-nineteenth century this dual standard had become even more arbitrary as the action of negligence developed out of case and, unlike the older action, became available as a remedy even where the injury inflicted on the plaintiff had been direct, thus constituting an alternative action to trespass. In the United States it was held as early as 1850, in the case of Brown v. Kendall 60 Mass. 292, that in a trespass action for unintnetional injury there could be no liability without fault. In England this result was not reached until forty years later in Stanley v. Powell, [1891] 1 Q.B. 86, although a limited exception to the standard of strict liability in trespass had already developed for injuries arising out of accidents on the highway.

For some time after Stanley v. Powell, however, it was thought that the onus of proof still differed when the action was in trespass rather than in

negligence, so that where the harm suffered by the plaintiff had been direct and he formed his action in trespass, it was said to be for the defendant to prove that he had not acted negligently or with intent to injure. This position was adopted by the Supreme Court of Canada in the case of Cook v. Lewis, [1952] 1 D.L.R. 1, in which the plaintiff was injured in a hunting accident by one or the other of two shots fired independently by two defendants, it being unknown which of the shots had actually wounded the plaintiff. Before going on to the hold that in such circumstances both defendants could be found liable in negligence, Cartwright J. interpreted Stanley v. Powell as saying that if in an action for damages in trespass the plaintiff proved that he had been injured by the direct act of the defendant, then the onus fell upon the latter to prove that his act was both unintentional and done without negligence.

A few years later this position was decisively rejected by the English courts in Fowler v. Lanning, [1959] 1 Q.B. 426. In that case, which arose on a point of pleading, the plaintiff's statement of claim merely alleged that at a certain time and place "the defendant shot the plaintiff." Diplock J., who did not cite Cook v. Lewis, held that regardless of whether an action for direct injury had been framed in trespass or in negligence, the onus of proving intention or negligence on the part of the defendant lay upon the plaintiff and that, furthermore, the decision in Stanley v. Powell had not addressed this point at all. Thus if a plaintiff relied upon negligence he had to state the facts which he alleged constituted negligence, and, in the absence of such particulars, the statement of claim in Fowler was held to disclose no cause of action. Diplock J.'s reasoning was adopted by the English Court of Appeal in Letang v. Cooper, [1964] 2 All E.R. 929, a case in which the defendant had been run over by a car driven by the plaintiff but had failed to bring an action for negligence within the requisite period of limitation. The Court unanimously held that the same statutory time limit applied to both trespass and negligence, Lord Denning M.R. and Danckwerts L. J. further holding that where an injury had been inflicted negligently but not intentionally a cause of action no longer lay in trespass, but in negligence only.

The Canadian courts continued to follow the dictum of Cartwright J. in Cook v. Lewis, however, albeit somewhat reluctantly at times. For instance, in Dahlberg v. Naydiuk (1969), 10 D.L.R. (3d) 319 (Man. C.A.) a hunter fired his gun over land adjoining that on which he was standing and severely injured the land's owner. In holding the defendant liable, Dickson J.A. (as he then was) cited Fowler and Letang and noted at 328 that Dean Wright had expressed the hope that some Canadian court would "put an end to the possibility of a difference in burden of proof depending solely on the direct or indirect application of the force," but nonetheless felt compelled to decide the case in accordance with Cook v. Lewis; any such change in the law, he felt, would have to be made by a court higher than the Manitoba Court of Appeal. Cook v. Lewis was also followed in a number of other provinces, including Ontario in Tillander v. Gosselin (1966), 60 D.L.R. (2d) 18 (Ont. H.C.), affirmed without reasons by the Ontario Court of Appeal (1967), 61 D.L.R. (2d) 192.

The Supreme Court of Canada had a chance to reconsider Cook v. Lewis in Mann v. Balaban (1969), 8 D.L.R. (3rd) 548, although the case involved an assault action only and not negligence. In ordering a new trial on the grounds that a jury charge had been defective, Spence, J. quoted Cook v.

Lewis but said only that in an action for assault the onus was on the plaintiff to prove that he had been assaulted and had sustained an injury thereby, and that it was then for the defendant to establish the defences, first, that the assault was justified, and second, that it had not been made with any unreasonable force.

Although Spence J. did not address the issue directly, his remarks could have been interpreted as meaning that in a trespass case it was for the plaintiff to prove intention if the action was for assault and, by implication, for the plaintiff to prove negligence if the defendant's act was alleged to be negligent. Subsequent cases continued to follow Cook v. Lewis, however. For instance, in Teece v. Honeybourn (1974), 54 D.L.R. (3d) 549 (B.C.S.C.) Rae J. said at 558 that he was found to follow the interpretation of Stanley v. Powell as set and in Cook v. Lewis, but if that were not so he would have found the reasoning in Fowler and Letang persuasive. In Teece the defendant police officer's revolver discharged and killed a suspected thief during a struggle. The deceased's family brought action, and Rae J. held the defendant liable on the grounds that he had not satisfied the Court that his pursuing the deceased with his finger on the trigger had not been due to any lack of reasonable care on his part. Cook v. Lewis was also followed by the Nova Scotia Supreme Court Appellate Division in Larin v. Goshen (1974) 56 D.L.R. (3d) 719, although again with reluctance.

The majority of cases in which Cook v. Lewis has been applied have involved trespass to the person, but in Bell Canada v. Cope (Sarnia) Ltd. (1980), 11 C.C.L.T. 170 (Ont. H.C.) Linden J. applied Cartwright J.'s dictum concerning the reversed onus of proof to a case in which direct damage had been inflicted upon property only. The defendant contractor, seeking and receiving false advice from the plaintiff as to which of its cables had been abandoned, deliberately cut through one of the plaintiff's live cables while excavating a roadbed, believing the cable to the dead. Linden J. did not attempt to distinguish damage to person and damage to property and held that in the present case the defendants had failed to discharge the onus upon them, the evidence in fact showing that they had damaged the plaintiff's cable intentionally as well as negligently.

The Bell case is also interesting for the reason that Linden J. found that the plaintiffs had been contributorily negligent, going on to hold that since the gist of the modern trespass action is fault and not strict liability, the Negligence Act applies in trespass cases so as to provide for apportionment of damages between plaintiff and defendant; the word "fault," as used in s. 4 of the statute, was said to include all intentional wrongdoing as well as negligence. An appeal on this point was dismissed in a short oral judgment by the Ontario Court of Appeal: (1980), 31 O.R. (2d) 571. A cross - appeal by the defendant on the finding of negligence made against him was also briefly dismissed; the issue of onus of proof in trespass actions was not discussed by the Court.